Supreme Court, U.S.
FILED

9 42038 JUN 13 1995

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FLEMING,
Petitioner,

VS.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD; CITY OF DELLWOOD, MISSOURI; CITY OF JENNINGS, MISSOURI; CITY OF FLORISSANT, MISSOURI; DAN CHAPMAN; ROBERT LOWERY; HARRY SLATEN; MICHAEL YARBOROUGH; and DENNIS CORDIA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the Supreme Court review the summary judgment procedure by which this claim of police misconduct was dismissed without trial:

1. Because the district court is required to accept yet refused to allow or consider the counteraffidavits contemplated by Civil Rule 56 prior to a grant of summary judgment on a "good faith" defense to false arrest; and

2. Because the Court of Appeals should require that the district court rule upon the merits of petitioner's §1985-based claim of false arrest before a grant of summary judgment; where the motions and arguments the court upheld neither challenged the claim of conspiracy nor requested judgment thereon.

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JURISDICTIONAL STATEMENT

This civil action for damages for false arrest was dismissed in the district court on March 15, 1994 in an order sustaining the defendants' motions for summary judgment. On appeal, pursuant to 28 U.S.C. §1291, the Eighth Circuit Court of Appeals sustained the ruling of the trial court on February 14, 1995 and denied rehearing on March 16, 1995. District Court jurisdiction is based upon 28 U.S.C. §§1331, 1343, and upon 42 U.S.C. 1983,

1985 and 1988. The Supreme Court has jurisdiction to review a final judgment of the Court of Appeals, 28 U.S.C. 1254(1).

The orders of the District Court were rendered by the Honorable Stephen N. Limbaugh and are not reported. The opinion of the Eighth Circuit Court of Appeals is unpublished.

STATEMENT OF THE CASE

William Fleming, a black man wrongfully indicted for the murder of a white police officer, was imprisoned for more than seven months during 1987. Upon his release and after two other men were convicted of the murder, Fleming filed a complaint in the District Court of Eastern Missouri to redress his wrongful incarceration. The Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment on behalf of defendants - the police authorities who brought about his arrest .

Fleming now seeks the general superintendency of this Court to review and correct the procedure by which his claim under 42 U.S.C. §1983 was rejected in the trial court which relied upon affidavits to which he was not allowed to respond, and without consideration by either court of his claim of conspiracy by the defendants under 42 U.S.C. 1985.

REASONS FOR GRANTING THE WRIT

STATEMENT OF FACTS

The suburban St. Louis, Missouri cities of Jennings, Florissant and Dellwood are among several dozen municipalities which have formed a voluntary regional police department designed to bring large-scale law enforcement resources to problems outside the range of the capabilities of the individual communities. Known locally as the Major Case Squad, the ad-hoc group was initiated to solve the highly-publicized murder in February, 1987 of Kenneth Koeller, a sergeant of police in the City of Jennings, Missouri. From a posture of scant evidence and with no actual eyewitnesses to the crime, the squad commenced an area-wide manhunt - a veritable dragnet - in which William Fleming was wrongfully ensnared. The defendants in the civil lawsuit are police authorities and their municipal masters who participated in his arrest and imprisonment.

The spectre of racial mathematics in this historically racially-polarized region arose almost immediately as the manhunt focused upon the black community. Among more than 100 potential culprits interviewed by the force, scarcely three were non-black even though at least one adult white male confessed that he was in the area and witnessed the shooting. Apparently convinced without rational basis that a black man was guilty, the squad directed its efforts to the pursuit of Fleming's arrest, indictment and incarceration without bail for more than seven months.

Two men with no connection to Fleming were eventually apprehended and prosecuted successfully for the policeman's murder and this action was thereupon filed in the district court. It is asserted in Count I that the members of the squad pursued the prosecution with full knowledge that Fleming was innocent, intending to mollify an inflamed community until the real murderer could be found. Count II alleges a conspiracy among the individual defendants to accomplish that purpose.

The defendants' summary judgment motions were adopted by the trial court on grounds of qualified immunity and, in the words of the court, because the individual defendants were not "sufficiently personally involved" to be liable for Fleming's arrest. But the court could not conclude the analysis on the basis of the affidavits and counter-affidavits initially presented since Fleming's claim of lack of probable cause had not been addressed. The court suggested, *sua sponte*, that the affidavit of Dan Chapman, the overall supervisor of the squad, be "supplemented" with additional materials to demonstrate the defendants' good faith. On the strength of the predictably self-serving rumor, hearsay, and "tips" thereupon supplied, the district court disposed of the question of probable cause and dismissed the remaining defendants from the case. Fleming was not allowed to respond or to demonstrate the falsity of the supplemental materials.[1]

On appeal Fleming challenged the dismissal on nine independent bases including the extra-territorial application of "qualified immunity" for actions outside the MCS officers' home jurisdictions, and the dismissal of the §1985 conspiracy claim with no consideration of its merits and without challenge by the defendants. Most important of course, and most serious was the failure to allow Fleming to respond to or to challenge the authenticity of the supplemental affidavits submitted by the defendants.

In its opinion (Appendix p. A-6) the Court of Appeals adopted the supplemental affidavits, ignored the procedural anomaly inherent in the radical application of Civil Rule 56, and simply refused to address the same issue that the district court did not address - that the §1985 conspiracy claim was unchallenged and should not have been dismissed.

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[1] Local Rule 7(B)2 of the Eastern District (Appendix A-25) allows 20 days to file counter-affidavits. The district court entered its ruling after only 14 days had elapsed.

It is clear that the 8th Circuit was aware of the use by the district court of the truncated summary judgment procedure. And it cannot be seriously doubted that the appellate court knew that the district court both accepted and relied upon the unchallenged supplemental allegations in reaching the conclusion that the complaint should be dismissed. These matters were fully briefed and addressed in Fleming's motion for rehearing. [2] Both courts realized that he was denied the privilege ordinarily accorded by the Federal Rules to challenge the authenticity of the self-serving rumors, exaggerations and downright lies offered to justify the heavy handed actions of this regional police force.[3] By failing to recognize or acknowledge the procedural oddity, the court of appeals simply adopted without comment the ad-hoc supplementation of the defendants' affidavits while ignoring the evisceration of the plan for fairness set out in Rule 56.

Probable Cause is a Jury Question

The existence of probable cause to arrest is, in the first place, a question for a jury and depends upon an assessment whether the facts and circumstances would warrant a reasonable belief that the arrestee was involved in the crime. *Dunaway v. New York*, 442 U.S. 200, 208, n. 8, 99 S.Ct. 2248, 2254, n. 8, 60 L.Ed.2d 824 (1979). In previous cases the 8th Circuit has held that a §1983 action is an appropriate forum in which to evaluate the existence of probable cause and that the question of a police officer's good faith is for a jury. In *Lovejoy v. Goodrich*, (8th Cir. 1986), 798 F2d 1201, the 8th Circuit held that prior police conduct is relevant and admissible for jury consideration on the issue whether a subsequent arrest is made in good faith or amounts to continuing police harassment. Fleming's counter affidavits suggesting a pattern of previous racially-based abuse by these

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[2] Motion for Rehearing p. Appendix p. A-20.

[3] The Major Case Squad has no corporate status. The individual officers must be made defendants along with their sponsoring municipalities.

municipalities, if accepted as true for summary judgment purposes, should have preserved the factual issue of these officers' "good faith" for determination by a jury.

Fleming produced substantial circumstantial evidence that the officers lacked a "good faith" belief that there was probable cause to arrest him.

Throughout the unpublished opinion the court of appeals adopted a terminology of description that unfairly characterizes Fleming's proffer of proof as "vague and conclusory" while minimizing the defendants' involvement as "minor participation".[4] The commentary upon the evidence was improper in the order of the district court. It is no more defensible for the court of appeals to suggest that the history, the context, and the racial mathematics - the circumstantial evidence - could not constitute an offer of "real evidence" of lack of good faith on the part of the police officers. That the investigation assumed immediately an unwarranted focus in the black community is not a "vague" notion. It is a fact contained in and derived by simple arithmetic from the documentary record of the investigation which was presented to the district court without challenge. It is, furthermore, an unchallenged fact that at least one Caucasian citizen was spared the personal embarrassment, humiliation and risk of arrest even though he admitted being present at the time and within the area of the commission of the crime.

Contrary to the suggestion by the court, these evidentiary elements offered by Fleming are not based upon "hearsay". They form an authentic record of the events from which a finding of racial animus on the part of the police is clearly reasonable. They are relevant, if sordid, details of this regrettable affair that can establish for a jury the malignant intent to vent the legitimate frustration of the community upon innocent black persons with

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[4] See Opinion of 8th Circuit (Appendix p. A-4, lines 1, 25.)

no articulable connection to the murder. The Supreme Court has affirmed that evidence need not be presented in a format that would be admissible at trial in order to survive summary judgment. Fleming was not required to "depose his own witnesses". *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The suggestions by the court that only direct, first-person or testimonial evidence is competent to meet Fleming's counter-affidavit burden is simply incorrect. The correct rule is that circumstantial and testimonial evidence are equivalent. The background of regional race relations and the refusal to consider the possibility that a white man was guilty are circumstances that should have been reserved for evaluation by a jury. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 158, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

The Grand Jury indictment does not foreclose the issue of the defendants' "good faith" belief that they possessed probable cause to arrest Fleming.

It is the essential point of this lawsuit that Fleming's arrest was without probable cause and that the grand jury process was subverted by the defendants with the acquiescence of the prosecuting authorities. On this issue the court of appeals suggests simply that:

> [T]he grand jury indictment serves to break a chain of causation between an alleged false arrest and a violation of constitutional rights.
>
> Opinion of 8th Circuit (Appendix p. A-6)

This court has ruled otherwise. In *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) the Supreme Court affirmed that a person falsely accused by an overzealous constabulary has a right to question whether the officer involved had reason to doubt the veracity of the evidentiary base underlying

the conclusion that probable cause existed - "despite the magistrate's authorization". 475 U.S. at 345, 89 L.Ed.2d 281, 106 S.Ct. 1098.

Once the district court even hinted at a basis to question the existence of probable cause for Fleming's arrest it should have been bound to allow and to demand equal augmentation of the proofs. Once the defendant police agencies were given a second chance to compose and present their recollection of past events so, also, should Fleming's readily available proofs to the contrary have been made part of the record of this reign of terror. No authority exists in support of the radical departure from the even-handed design of Rule 56.

The Court of Appeals has sanctioned the summary dismissal of Fleming's separate allegation of conspiracy under §1985 without consideration of the merits of the claim.

The Court of Appeals has admitted that Fleming's request for review is in nine parts.[5] However its ruling consists of little more than a capsulization and recapitulation of the district court's conclusion that the involvement of the police officers amounted to "nothing further to do with the investigation" and "minimal involvement". These judgments of the quality of the evidence are subjective, opinion-driven, factual determinations appropriate for consideration by a jury and inappropriate for review by an appellate court. In an opinion substantially devoted to these factual disputes, a serious discussion of the remaining issues upon which Fleming's appeal was bottomed goes wanting. Neither court suggests a rationale to square the conclusion that Fleming's evidence is insufficient with the rule enunciated by this Court that summary judgment is not a proper time for a district court to substitute its view of the *weight* of the evidence:

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[5] See Opinion of 8th Circuit (Appendix p. A-3)

> "The judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Summary judgment is particularly ill-suited to resolve questions in which intent, good faith and other subjective feelings play dominant roles. *Freeman v. Blair*, 793 F2d 166, 171 (8th Cir. 1986).

The issue of central import in this appeal remains the failure by the appellate court even to comment upon the almost flippant manner in which Fleming's separate §1985 claim was considered and dismissed. Count II was directed to the possibility that the individual defendants might escape liability under §1983 by claiming that their separate actions were insufficient to render any one of them liable for the harm that has resulted. This is precisely the scenario for which §1985 was designed - to assure that those whose plan relies upon teamwork will not escape liability for an illegal purpose successfully achieved.[6]

Viewed through the transforming prism of a conspiracy, the simple analytical protocol of "personal" involvement, or "direct" responsibility, arguably appropriate under §1983, is plainly insufficient. This court has said that "Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it". *Bourjaily v. U.S.*, 483 U.S. 171, 181, 107 S.Ct. 2775, 2781, 97 L.Ed.2d 144 (1987). The sum of an evidentiary presentation may well be greater than its constituent parts. *Id.* 107 S.Ct. at 2781.

Refusing even to consider the "concerted action" theory the Court treated the §1985 claim as congruent with § 1983 and subject to dismissal also.

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[6] A claim under §1985 is not subject to the qualified immunity defense for public officials. See: *Burrell v. Board of Trustees of Georgia Military College*, (11th Cir. 1992) 970 F2d 785, 794.

CONCLUSION

Both the district court and the court of appeals have dealt with this complaint as if the fiery issue of police misconduct were not involved. Yet a threat more predictable to the order of this nation cannot be imagined than should ensue if the federal courts now choose to abandon their critical role of protector of all the citizens of the United States. This litany of error is not a matter of simple technical violations, it is an unexplained application of the judicial power in an unequal manner to shield from scrutiny the motives of the law enforcement community which brought about Fleming's imprisonment.

It must not be forgotten that this man's innocence of the charge of murder is forever imprinted within the historical record of this state by virtue of the conviction of others for the crime. It is intolerable that he be not allowed to show that the tale the district court believed was, like the crudely sensational media blitz which accompanied his arrest, simply a lie.

The Court of Appeals has failed to guarantee that this Petitioner's freedom is the business of the federal courts. Under circumstances in which every other court of the land would assure an equal forum, there is no equality in the 8th Circuit. This court must intervene. It must direct that the rules of procedure be fairly applied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2051EM

William Fleming,
Appellant,

v.

Greater St. Louis Area Major Case Squad; City of Dellwood; City of Jennings; City of Florissant; Dan Chapman; Robert Lowery; Harry Slaten; Michael Yarborough; and Dennis Cordia,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: November 17, 1994

Filed: February 14, 1995

Before RICHARD S. ARNOLD, Chief Judge, BRIGHT, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

William Fleming, indicted for the murder of a police officer, was imprisoned for more than seven months in 1987. After his release he filed a complaint under several civil-rights statutes to redress his wrongful incarceration. The District Court[1] granted the defendants' motions for summary judgment, and Fleming appeals. We Affirm.

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[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

I.

Sergeant Koeller, a City of Jennings police officer, was shot in the neck and killed while investigating a burglary. Defendant Michael Yarborough and another police officer found his body lying beside his police car. Additional police officers soon arrived, and a search of the area for witnesses and suspects began. Yarborough participated in the search of the immediate area and later filed a report.

The next day, the Jennings Police Department asked the St. Louis Area Major Case Squad to begin an investigation of the murder. Although there is some dispute as to who in the Jennings Police Department requested the assistance of MCS, defendant Robert Lowery, MCS Chairman of the Board, states that defendant Harry Slaten made the request. Lowery consulted with the three-member MCS Board of Directors and ordered the activation of the MCS. The MCS was composed of police departments from the cities of Dellwood, Jennings, and Florissant. Once the MCS began investigating, the Jennings Police Department stopped its investigation.

Defendant Colonel Dan Chapman of the Dellwood Police Department was the MCS commander for the case, and defendant Officer Dennis Cordia was the MCS report officer. The MCS investigation lasted fifteen days and included interviewing possible witnesses and conducting polygraph examinations.

Following the MCS report to the St. Louis County Police Department, Lieutenant Jack Oliver of MCS applied for a warrant for plaintiff's arrest from the Chief Warrant Officer. Cordia, acting as custodian of the MCS records, went with Oliver. The Warrant Officer granted the request for the warrant, and Fleming was arrested. The MCS file for this investigation was then closed, and the Jennings Police Department resumed its supervision of the case.

On February 29, 1987, William Fleming was indicted for murder in the first degree by the Grand Jury of St. Louis County. Following a bail hearing, plaintiff remained incarcerated until September 1987, when charges against him were dropped, and he was released. Subsequently, two other men have been found guilty of the murder of Sergeant Koeller.

Fleming brought a complaint against the three cities and five other defendants under 42 U.S.C. §§ 1981, 1983, 1985, and 1988 for violations of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights. The defendants moved for summary judgment; the District Court granted the motions and dismissed the claims. On appeal, Fleming alleges nine grounds of reversible error by the District Court. We affirm.

II.

Our review of an order granting summary judgment is governed by the same standard the District Court employed — whether the record, viewed in the light most favorable to the non-moving party, shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Save Our Health Organization v. Recomp of Minnesota. Inc.*, 37 F.3d 1334 (8th Cir. 1994). If the moving party makes an initial shoving that no question of fact exists, the non-moving party must then point out specific facts showing that there is sufficient evidence which would allow a jury to return a verdict for it. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party cannot provide such facts, then an order granting summary judgment is appropriate and will stand.

None of Fleming's allegations convinces this Court that the District Court erred in granting summary judgment. Fleming proffers no factual evidence to support any of his claims that the cities acted in a discriminatory manner against him or against the black community. His allegations of discriminatory actions and

conspiracies are vague, conclusory, and based on hearsay. Such statements cannot rebut the evidence that the moving parties submitted to show that the cities did not possess a policy of discrimination against the black community, or a custom of permitting or authorizing the procuring of false testimony, or a practice of arresting individuals without cause.

As to the allegations against the individual police officers involved in this investigation, Fleming presents no evidence to prove that the defendants caused the production of improper evidence or that any of the defendants participated in the investigation in anything other than a limited manner. The plaintiff must show at least a causal connection between the misconduct complained of and the official sued. *Harris v. Pirch,* 677 F.2d 681, 685 (8th Cir. 1982). As we review the actions of each defendant in turn, we find that Fleming has not shown the necessary causal connection for liability to attach to any of the defendants.

Yarborough, the first officer to arrive at the scene of the murder, secured the area, investigated the scene, and filed a report. His involvement with the case stopped after that. The plaintiff argues these actions are enough for this Court to find that Yarborough's preliminary investigation and subsequent report denied Fleming his civil rights and also show that he acted in a conspiracy with the other officers to deprive Fleming of those rights. We cannot find that such minor participation with the investigation is enough to establish a link between Yarborough and the alleged mistreatment of Fleming.

The only fact Fleming cites against Slaten is that Slaten contacted the MCS Board to request its investigation of the murder of Sergeant Koeller. These actions alone are not enough to find liability, especially considering that it is up to the MCS Board to decide whether it would investigate or not. Fleming attempts to use Slaten's position as police chief for the City of

Jennings to place liability on him. Although Slaten would have seen reports from the investigation, he was not directly involved with the investigation or indictment of Fleming, and he cannot be found liable under the doctrine of respondeat superior. *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986).

Lowery is the Chief of Police for the City of Florissant and Chairman of the Board of Directors of the MCS. He was part of the Board which decided to activate the MCS, but once the MCS was activated, the investigation was turned over to MCS Commander Dan Chapman, and Lowery had nothing further to do with this investigation. Lowery's involvement with the arrest of Fleming is minimal and does not reveal any direct responsibility for the alleged improper action.

The evidence presented to the District Court about Chapman was that he signed a warrant application and presented evidence to the magistrate judge for Fleming's arrest. There is nothing that shows that Chapman knew that any of the evidence was fabricated or coerced; he did not gather the evidence or interview any of the witnesses. His responsibility was to oversee the investigation. Except for Fleming's speculations, nothing shows that Chapman had any knowledge that the investigation was handled in bad faith. As noted above, an action against police supervisory officers cannot be based upon the theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658, 690-94 (1978). For liability to attach, the supervising police officer must be directly responsible for the alleged misconduct. *Pirch*, 677 F.2d at 685. There is no evidence that Chapman had any direct responsibility for any of the alleged misconduct. Therefore, summary judgment was proper.

The remaining defendant is Dennis Cordia, the records clerk. His only involvement in this case was ministerial; he kept the papers generated by the investigation in order. His involvement is not enough to attach any kind of liability to him.

In light of the facts before this Court, we do not see that any of the defendants acted in bad faith or that they took any actions with deliberate disregard for Fleming's constitutional rights. Not one of these defendants has enough personal involvement in the investigation of this case to allow a jury to return a verdict for the plaintiff.

Fleming also alleges that he was falsely arrested. He does not, however, offer any real evidence that the officers did not have a good-faith basis for his arrest. His arrest followed an indictment by a grand jury based on evidence the grand jury felt was worthy of belief. Fleming offers nothing but speculation to support the notion that anyone acted improperly in obtaining or presenting evidence that the grand jury heard. This Court will not look behind a grand jury's finding that probable cause exists without something more than conjecture. The grand jury indictment serves to break a chain of causation between an alleged false arrest and a violation of constitutional rights.

We affirm the District Court's grant of summary judgment.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2051EMSL

William Fleming,
Appellant,

vs.

Greater St. Louis Area Major Case Squad, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing has been considered by the Court and is denied.

March 16, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,

vs.

GREATER ST. LOUIS MAJOR CASE SQUAD, ET AL.,
Defendants.

ORDER

[Filed: March 15, 1994]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendant Dan Chapman's motion for summary judgment (#63), filed September 30, 1993 be and is **GRANTED** in its entirety. Summary judgment is entered for the defendant and against the plaintiff on the merits of the plaintiff's complaint. This cause of action is hereby **DISMISSED** and removed from the Court's trial docket of April 18, 1994.

Dated this 15th day of March, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,

vs.

GREATER ST. LOUIS MAJOR CASE SQUAD, ET AL.,
Defendants.

MEMORANDUM

[Filed: March 15, 1994]

On February 11, 1984 this Court entered summary judgment in favor of defendant Dan Chapman on the merits of the plaintiff's §1983 claim based upon *respondeat superior* and the plaintiff's §1985 claim. However, in his response to defendant Chapman's summary judgment motion, plaintiff raised the issue of qualified immunity (i.e. lack there of) for the first time. The Court decided to allow defendant Chapman to address the issue of qualified immunity before rendering a final decision on the defendant's motion for summary judgment (#63). On February 25, 1994 defendant Chapman filed his response to the Court's order addressing the issue of qualified immunity.

To reiterate the plaintiff's position, he contends that the Major Care Squad indulged in "wholesale arrest of black persons" and that "no one knew whether the assailant was black or white." He specifically contends that defendant Chapman was instrumental in having the plaintiff falsely accused, arrested, and imprisoned "without a jot of proof of his involvement in the shooting." Plaintiff's Response to Chapman's Motion for Summary Judgment, pgs. 10 and 14.

The Court interpreted the plaintiff's statements as advancing the argument that he was arrested without probable cause. The Court reviewed the defendant's evidence on the record.[1] Although the evidence was substantial, the Court felt that the defendant should be given the opportunity to respond to the plaintiff's contention that he was arrested without probable cause. Defendant Chapman has now filed his affidavit and submitted documents to support his position that probable cause existed for the plaintiff's arrest and that he is entitled to the protection of qualified immunity.

The following is a reiteration of the relevant holdings and caselaw pertaining to qualified immunity and its application to a police officer's actions in effecting an arrest.

Public officials, such as governors, prison officials, school board members, parole board members, and police officers, who exercise some discretionary functions while carrying out their executive duties generally have available to them qualified or good faith immunity from §1983 actions. These persons are immune from suit on the basis of good faith immunity unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In *Anderson v.*

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[1] In his Answers to the plaintiff's second set of interrogatories, Chapman attaches a copy of a progress report, dated November 23, 1987, regarding the Koeller murder investigation. The report lists several witnesses, their testimony, and whether the witness recanted or continued to be cooperative in the investigation. The plaintiff, his brother, and two other persons are listed as suspects. The report reflects a number of witnesses making incriminating statements regarding the plaintiff and his brother's alleged involvement in the planned burglary at the Northland Shopping Center and the subsequent murder of Officer Koeller. Several of the witnesses placed the plaintiff and his brother at the murder scene shortly before the discovery of Koeller's body. A black skull cap was found beneath the body and hair samples from the cap were consistent with hair samples taken from plaintiff's brother.

Creighton, 483 U.S. 635 (1987), the Supreme Court examined the scope of the *Harlow* "clearly established" standard. Whether a public official protected by qualified immunity may be held personally liable for the alleged unlawful action will depend on the "objective legal reasonableness" of the action, which must be assessed in light of the laws or "legal rules" that were "clearly established at the time the action occurred. *Anderson*, at 639-40. The Court specifically held that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right". *Id.*, at 639-40.

When a police officer's request for a warrant allegedly caused an unconstitutional arrest, the objective reasonableness standard of *U.S. v. Leon*, 468 U.S. 897 (1984) will define the police officer's qualified immunity. However, the immunity will be lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. . .". *Malley v. Briggs*, 475 U.S. 335, 345 (1986). The pivotal question is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.*, at 345.

The issue then before this Court is whether defendant Chapman, a reasonably competent police officer, could have reasonably believed that probable cause existed to seek out a felony arrest warrant against the plaintiff for the murder of Officer Koeller.

In Missouri, the courts have defined probable cause as "knowledge of facts and circumstances sufficient for a prudent person to believe the suspect is committing or has committed an offense." *State v. Kroll*, 682 S.W.2d. 78, 82 (Mo.App.1982), *State v. Giffin*, 640 S.W.2d. 128, 131 (Mo.App.1982). Probable cause to arrest does not require absolute certainty that the suspect did indeed commit the crime. *Giffen*, at 131 citing *State v. Perry*, 499 S.W.2d. 473 (Mo.1973). Furthermore, Rule 22.03 VAMR requires an independent finding of the issuing court that the felony

complaint has sufficient facts to show probable cause that a felony has been committed by the suspect. *State v. Adams,* 791 S.W.2d. 873, 877 (Mo.App.1990).

Defendant Chapman has filed an affidavit and copies of relevant documents to support his "reasonable and good faith" belief that probable cause existed to seek out a felony arrest warrant against William Fleming for the murder of Officer Kenneth Koeller. Defendant attests, and the filed exhibits support, that at the time of the plaintiff's arrest, certain physical evidence and witness testimony incriminated the plaintiff in the murder of Officer Koeller. This included:

1) Numerous witnesses' statements indicating the plaintiff and his brother's involvement in a planned burglary at the Northland Shopping Center at the time of Officer Koeller's murder. (These statements are contained in the progress report previously filed and noted in Footnote 1 of this memorandum).

2) The identification of the plaintiff and his brother by an undercover security guard at the Lerner's Store, which is adjacent to the burglarized shop outside which Officer Koeller's body was discovered. The security guard identified the plaintiff, his brother, and a third man as being in the Lerner's Store shortly before the burglary and murder of Officer Koeller. She further identified plaintiff and his brother as wearing skull caps, one of which was later found underneath Officer Koeller's body.

3) The skull cap contained hair samples which were consistent with hair samples taken from the plaintiff's brother.

4) Certain false statements (regarding a "poncho) made by the plaintiff's brother.

5) Plaintiff's "disappearance" for approximately one week following the murder of Officer Koeller.

Plaintiff has not refuted any of the evidence presented by the defendant as to the circumstances surrounding his arrest. Plain-

tiff has not presented any caselaw which would indicate that the facts as presented would not constitute probable cause for the swearing out of a felony complaint against him. Plaintiff has failed to demonstrate in any way, by setting forth specific facts or affirmative evidence, that the defendant does not meet the requirements for the protection of qualified immunity.

In the instant matter, Officer Dan Chapman clearly possessed sufficient reliable information to establish probable cause to believe that plaintiff had committed or participated in the murder of Officer Koeller. The Court finds that probable cause existed for the swearing out of a felony complaint against the plaintiff for the murder of Officer Kenneth Koeller. The Court will grant the defendant's motion for summary judgment and accord him the protection of qualified immunity in this cause of action.

Dated this 15th day of March, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,

vs.

GREATER ST. LOUIS MAJOR CASE SQUAD,
Defendant.

ORDER

[Filed: Feb. 11, 1994]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendant Chapman's motion for summary judgment (#63), filed September 30, 1993 be and is **GRANTED** in part. Summary judgment is entered for the defendant and against the plaintiff on the merits of the plaintiff's §1983 claim based upon *respondeat superior* and his §1985(3) claim.

IT IS FINALLY ORDERED that defendant Chapman shall have the opportunity to address the issue of qualified immunity as raised in the Plaintiff's Response to Chapman's Motion for Summary Judgment (#67). Defendant Chapman shall file, on or before February 25, 1994 any brief and/or exhibits that he wishes the Court to consider in making a final ruling on this issue. Once this response time has expired, the Court will consider the issue ripe for disposition.

Dated this 11th day of February, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-2051

WILLIAM FLEMING,
Plaintiff-Appellant,

v.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD; CITY OF DELLWOOD; CITY OF JENNINGS; CITY OF FLORISSANT; DAN CHAPMAN; ROBERT LOWERY; HARRY SLATEN; MICHAEL YARBOROUGH; AND, DENNIS CORDIA;
Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

HONORABLE STEPHEN N. LIMBAUGH

PETITION FOR REHEARING

Helton Reed, Jr.
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St. Louis, MO 63113

Stephen H. Gilmore
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St. Louis, MO 63105

Counsel for Appellant

SUMMARY OF THE CASE AND REQUEST FOR REHEARING

The Court of Appeals has affirmed a judgment of the District Court which dismissed the claims of Appellant, William Fleming, for damages arising from his wrongful arrest in 1987. The opinion of this court has disposed of this appeal in which nine issues of error are presented in an opinion which cites only three supporting cases. Rehearing is urged because at least five substantial issues remain unaddressed each of which should result in reversal of the District Court decision.

ARGUMENT

I.

QUALIFIED IMMUNITY

The District Court has declared that the defendant police officers are clothed with the mantle of qualified immunity. That concept, ignored by the opinion of this Court, defines the analytical framework of this appeal. This is no ordinary summary judgment proceeding. It is a review of allegations of police misconduct for which the application of the doctrine of official immunity is "qualified" by a double-pronged analysis which these defendants did not meet and which the District Court did not require.

It is a cornerstone of the law of immunity that the action of the officer claimed to be immune from tort liability must arise from and be compelled by the position and duties of that office. In this case, neither the condition of compulsion nor the companion requirement that the action be within the scope of the official function was ever met. *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (N.34), 73 L.Ed.2d 396, 411, 102 S.Ct. 2727 (1982). In their District Court motions the defendants utterly failed to produce a quantum of proof upon which the threshold standard for immunity could be based. What was shown, instead, was an area-wide

manhunt by an informally organized group of officers operating outside their statutorily-limited jurisdictions. It is a glaring error of substance that the district court granted immunity where it does not belong.

II.

THE SECTION 1985 CONSPIRACY CLAIM

The opinion of this court has judged the claims of false arrest, false indictment and denial of bail as a single cause of action and has erroneously applied a one-dimensional review of the conduct of the individual defendants. However, Fleming's complaint deserves more thorough analysis since it suggests a more complex purpose than the mere coincidental negligence of individual police officers. He alleges and should be allowed to demonstrate to a jury that the actions of these defendants were part of a concerted effort - a combination - designed to prevent public recognition of the failure to solve by lawful means the murder of the Jennings police officer.

Appellant's theory that his arrest was an intentional sacrifice of constitutional guarantees designed to mollify local media scrutiny of the performance of the Major Case Squad is a cause of action under §1985 that cannot be judged by standards which apply where individual actions are involved. This is a conspiracy and it is in the nature of a conspiracy that the improper results are brought about by the conduct of several persons any of whose involvement might not be sufficiently culpable to support individual liability. For this reason, and because of the requirement to show a specific discriminatory animus, a 1985 action is *not* subject to the heightened pleading standard of qualified immunity. *Burrell v. Board of Trustees of Georgia Military College,* (11th Cir. 1992) 970 F2d at 788.

III.

CIRCUMSTANTIAL EVIDENCE OF CAUSATION

The Court has adopted, throughout the unpublished opinion, a terminology of description that unfairly characterizes Appellant's proffer of proof as "vague and conclusory" (Opinion p. 4 line 5). Elsewhere the defendant's involvement is labelled "minor participation (Opinion p. 4 line 29). This commentary upon the evidence was an improper function in the order of the District Court. It is no more defensible for the Court of Appeals to suggest that the history, the context, and the racial mathematics of this case—the circumstantial evidence—might not constitute in its totality an offer of "real evidence" of lack of good faith by the officers. (See Opinion p. 6 line 13).

That the investigation assumed immediately, an unwarranted focus in the black community is not a "vague" notion. It is a fact contained in and derived by simple arithmetic from the documentary record of the investigation which was presented to the District Court without challenge. It is furthermore an unchallenged fact that a white citizen was spared the personal embarrassment, inconvenience, and risk of prolonged incarceration even though he admitted being present at the time and within the area of the commission of the crime.

These evidentiary elements are not based upon 'hearsay' as the opinion suggests. They form an authentic record of the events from which a finding of racial animus is clearly reasonable. They are relevant if sordid details of this regrettable affair that can establish for a jury the malignant intent to vent the legitimate frustration of the community upon innocent black persons with no articulable connection to the crime.

IV.

THE DENIAL OF BAIL IS A SEPARATE OFFENSE

Fleming's separate claim that the defendant's misrepresentations caused him to be denied a reasonable bail has been ignored in the court's opinion. In neglecting to address this issue, the court has affirmed the improper result that Fleming's arguably legitimate arrest may shield from further scrutiny the officers' subsequent acts. This conclusion cannot be sustained and should be re-addressed on rehearing since an officer's good-faith remains subject to challenge despite a supervening judicial proceeding. *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Fleming's right to have his request for bail considered fairly was a distinct right, deserving of individual attention apart from any determination of the validity of his arrest.

V.

The court has suggested that Fleming's allegations of discriminatory action are 'based on hearsay' and therefore insufficient to 'rebut' the defendants' evidence of proper purpose. (Opinion p. 4 line 5). This is an erroneous statement of the law. The affidavits offered to demonstrate prior racist activities by these defendants are the kind of evidence of prior behavior specifically authorized by this circuit in *Lovejoy v. Goodrich,* (8th Cir. 1986), 798 F2d 13201 at 1203. The U.S. Supreme Court has affirmed moreover, that evidence to survive summary judgment need not be presented in a format that would be admissible at trial. A defendant is not required to "depose his own witnesses". *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

It is, finally, a hollow indictment to charge Fleming with a failure "to offer any evidence" of bad faith by the officers where the opportunity to do so was foreshortened and foreclosed by the district court which requested, received and considered the

defendants' additional probable-cause related materials. (Appendix p. A-6). A greater injustice cannot be imagined than the assumption by the judge of the function of trier of fact while refusing to entertain Fleming's side of the argument. (See Brief of Appellant p. 25-26).

This Court should not allow the provisions of Rule 56 to be dismissed discounted and ignored.

CONCLUSION

Because the opinion of the Court of Appeals is incomplete and does not address the elements of Appellant's appeal that should require reversal of the District Court, a rehearing of this matter should be ordered.

/s/ Helton Reed
HELTON REED - 25741
ATTORNEY FOR
PLAINTIFF-APPELLANT
2616 N. Kingshighway
St. Louis, MO 63113
361-1708

This is to certify that two copies of the foregoing Petition for Rehearing were delivered to the offices of the following counsel this 28th day of February, 1995:

APPENDIX F

42 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

42 USC § 1985(3)

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX H

Federal Rules of Civil Procedure — Rule 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial

controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions answers to, interrogatories, or further affidavits When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

APPENDIX I

U.S. District Court - Eastern District — Rule 7B(2)

(2) Except with respect to a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, each party opposing a motion shall serve and file, within five (5) days after being served with the motion, any written brief containing any relevant argument and citations to authorities on which the party relies. If any motion requires consideration of facts not already appearing in the record, the party shall serve and file with its brief copies of all documentary evidence, affidavits, or photographs required or permitted by the Federal Rules of Civil Procedure. A party opposing a motion for summary judgment under Federal Rule of Civil Procedure 56 shall serve and file any written brief or memorandum of law and any appropriate extra-pleading materials within twenty (20) days after being served with the motion.